

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA08-708

JEFFERY MORENO

APPELLANT

V.

B. J. KNOWLES and ROBIN
KNOWLES

APPELLEES

Opinion Delivered March 11, 2009

APPEAL FROM THE DREW
COUNTY CIRCUIT COURT
[NO. PR-2007-73-2, PR-2007-73-5]

HONORABLE ROBERT C.
VITTITOW, JUDGE

AFFIRMED

LARRY D. VAUGHT, Chief Judge

Appellant Jeffery Moreno appeals a decree entered by the Drew County Circuit Court, granting the adoption petition filed by appellees Robin and B.J. Knowles. Moreno argues that the trial court erred in finding that his consent to the adoption was not required because he failed for a period of one year, without justifiable cause, to significantly communicate with his daughter, K.M. We disagree and affirm.

On July 7, 2002, Robin gave birth to K.M. Thereafter, Robin and Moreno, K.M.'s father, married. The marriage, plagued by drugs and violence, lasted only two years. When the parties divorced in February 2005, Robin was awarded custody. Moreno was awarded visitation and ordered to pay child support. Moreno exercised visitation until September 2005, when he was incarcerated for assaulting his disabled father. In December 2005, Robin and K.M. moved in with B.J., who has provided parental care for K.M., both emotionally and financially, as if she was his own child since that time. Robin and B.J. married in July 2007.

Moreno was released from prison in December 2005. It is undisputed that neither Moreno nor any of his family members exercised visitation with K.M., or even saw or spoke with her, from September 2005 to July 2007. On July 20, 2007, Robin and B.J. filed a petition to adopt K.M. Robin also sought an order of protection against Moreno. In response, Moreno filed a motion for contempt and to establish specific visitation, alleging that Robin had actively prevented him from exercising visitation with K.M.

After a hearing, the trial court entered a letter opinion granting the petition to adopt, dismissing the petition for an order of protection, denying the motion for contempt, and finding that the motion for specific visitation was moot. In granting the petition for adoption, the trial court found that neither Moreno nor any of his family members exercised visitation with K.M. since September 2005.¹ The court acknowledged Moreno's testimony that his failure to communicate with K.M. was due to his inability to contact Robin, but the trial court cited other contrary testimony. After concluding that Moreno failed significantly to communicate with K.M., without justification, for a period of over one year, the trial court found that Moreno's consent to the adoption was not required.² An order formalizing these findings and the decree of adoption were filed thereafter. Moreno files this timely appeal.

On appeal, Moreno argues that the trial court was clearly erroneous in finding that his consent for the adoption of K.M. was not required because Robin and B.J. did not prove by

¹The trial court further found that Moreno made sporadic support payments; therefore, it could not find that there was no significant support for a continuous one-year period.

²The trial court also found that it would be in the best interests of K.M. to be adopted by B.J. Moreno has not appealed this finding.

clear and convincing evidence that Moreno failed significantly, without justifiable cause, to communicate with K.M. While Moreno concedes that he did not communicate with K.M. for over a year, he urges that his failure was justifiable. He points to his own testimony establishing that he attempted to contact Robin without success. He tried to contact her at work, and she would run out of the back of the business. He called her on the phone, but she would hang up on him. He testified that since January 2006, he called B.J. approximately four to six times about K.M. He sought out B.J. as an intermediary in an effort to establish visitation. He further claims that his family tried to contact Robin in an effort to establish visitation, but Robin again refused to cooperate.

Arkansas Code Annotated section 9-9-207(a)(2)(i) (Repl. 2008) provides, in pertinent part, that consent to adoption is not required of:

[A] parent of a child in the custody of another, if the parent for a period of at least one (1) year has failed significantly without justifiable cause (i) to communicate with the child or (ii) to provide for the care and support of the child as required by law or judicial decree[.]

Statutes for the adoption of children are strictly construed and applied. *In re Adoption of K.F.H.*, 311 Ark. 416, 844 S.W.2d 343 (1993). A heavy burden of proof is placed on one wishing to adopt a child without the consent of a parent and that burden is by clear and convincing evidence. *Id.* While we review adoption proceedings de novo on the record, it is well settled that the decision of the trial court will not be disturbed unless clearly erroneous, giving due regard to the opportunity and superior position of the trial court to judge the credibility of the witnesses. *Bemis v. Hare*, 19 Ark. App. 198, 718 S.W.2d 481 (1986).

In the case at bar, it is undisputed that Moreno did not communicate with K.M. for a period in excess of one year. As such, we are left with the pivotal question of whether Moreno's failure to communicate was without justifiable cause. "Justifiable cause' means that the significant failure must be willful in the sense of being voluntary and intentional; it must appear that the parent acted arbitrarily and without just cause or adequate excuse." *Bemis*, 19 Ark. App. at 202, 718 S.W.2d at 482. We view the issue of justifiable cause as factual, but one that largely is determined on the basis of the credibility of the witnesses. *In re Adoption of K.F.H.*, 311 Ark. at 423, 844 S.W.2d at 347. Lastly, we give great weight to a trial court's personal observations when the welfare of young children is involved. *Id.*

Here, the issue of justification comes down to a swearing match between the parties as to whether Moreno actually made efforts to see K.M. after September 2005, and if so, were they frustrated by Robin. There is testimony from both sides, as pointed out by the trial court. Moreno and his family members insist that they tried to contact Robin to arrange visitation with K.M., but that Robin resisted. Moreno claims he contacted Robin at work on the phone and in person. She would either hang up or run away. He claims he did not have her cell-phone number. And while he admitted that he was aware of his legal options to seek visitation, Moreno said he did not want to pursue them because he hoped that it would work itself out.

However, Robin's testimony was quite different. She testified that not only did Moreno fail to exercise visitation with K.M. after September 2005, he did not send birthday cards, Christmas cards, or any other gifts. Moreno's mother testified that she had not seen K.M. since September 2005 and that she did not call Robin about visiting K.M. after Moreno

was released from prison in December 2005. The only conversation B.J. recalled between Robin and Moreno took place in December 2005, after Moreno was released from prison. B.J. overheard Moreno tell Robin that “he should have beat her ass like a man while she was with him.” Robin testified that she did not hear from Moreno until May 2007 when Moreno started calling B.J. She stated that she has had the same cell-phone number the last ten years. Robin further testified that Moreno did not attempt to see K.M. until after child-support enforcement brought an action against him in July 2007 for child-support arrearages.

The trial court found Robin’s version of events on the issue of justification more credible. We will not disturb that credibility finding on appeal. *In re Adoption of K.F.H.*, *supra*. Because the proof that Moreno failed significantly to communicate with K.M. without justification for more than a year was clear and convincing, we cannot say that the trial court was clearly erroneous in granting the petition for adoption without his consent. Accordingly, we affirm.

Affirmed.

GLADWIN and BAKER, JJ., agree.